LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 21 1971
E. ROBERT SEAVER, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 989

BILLY BAXTER, INC.,

Petitioner,

v.

THE COCA COLA COMPANY and
CANADA DRY CORPORATION,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

James V. Joy, Jr.
60 East 42nd Street
New York, New York 10017
Attorney for Petitioner

Of Counsel:

Joy and Wolk
Edward V. Egert
Lucille J. Becker

INDEX

Preliminary Statement	**1**
Conflict in the Circuits	**2**
Conclusion	**3**

TABLE OF AUTHORITIES

Cases	*Page*
Fields Productions, Inc. v. United Artists Corp. - F.2d - (2nd Cir., 1970)	**2**
Mulvey v. Goldwyn - F.2d - (9th Cir., 1970)	**2**
Statutes	
15 USC Sec. 15	**1, 2**

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 989

BILLY BAXTER, INC.,

Petitioner,

- against -

THE COCA COLA COMPANY
and CANADA DRY CORPORATION,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

This reply brief is submitted to appraise the Court of the recent judicial acknowledgement by the United States Court of Appeals for the Ninth Circuit of the conflict between the circuits on the standing requirement of Section 4 of the Clayton Act (15 U.S.C. Sec. 15). It is respectfully submitted that this acknowledged conflict mandates a resolution by this Court and belies respondents' attempt in their Brief in Opposition to dispose of this controversy by their own fiat.

THE CONFLICT IN THE CIRCUITS

In the recent *per curiam* opinion of the United States Court of Appeals for the Second Circuit in the case of *Fields Productions, Inc. v. United Artists Corp.* - F.2d - (2nd Cir., September 8, 1970), the Circuit Court, in denying the petitioner standing under Sec. 4 of the Clayton Act as its full opinion stated:

> "The judgment of the District Court is affirmed on the opinion of Judge McLean filed on May 27, 1969, Docket No. 68 Civil 198. See also *Billy Baxter, Inc. v. The Coca Cola Co. and Canada Dry Corp.* - F.1d - (2 Cir. August 25, 1970)"

The District Court in the *Fields Productions* case had held that a producer of a motion picture lacked standing to sue for damages sustained by reason of an alleged block booking arrangement under which a motion picture exhibitor refused to license the showing of the producer's picture to television stations unless other pictures were also televised. Applying the same reasoning as used in the lower courts in the instant case, the distributors (franchisees) were held to be in the target area of the violation while the producer's injury was branded "incidental".

While the Second Circuit ratified the majority opinion below as the law of its forum, the Ninth Circuit has taken a stand 180^{o} in the opposite direction.

In the very recent case of *Mulvey v. Goldwyn* - F.2d - (9th Cir., October 20, 1970, Petition for Rehearing, denied, December 1, 1970) the Ninth Circuit reversed the lower court's dismissal of plaintiff's antitrust claim for lack of standing under Clayton Act Sec. 4, 15 U.S.C. Sec. 15. In *Mulvey*, the plaintiff, sole owner of certain motion pictures, brought suit for antitrust damages sustained by reason of defendant's block booking of his films.

In rejecting defendant's arguments regarding plaintiff's

standing as "specious" the Court unqualifiedly stated:

> "We disagree with the contrary conclusion reached on the standing issue by the Second Circuit, *per curiam*, in *Fields Productions, Inc. v. United Artists Corp.* (Sept. 8, 1910 - F.2d - "

Clearly a split exists between the Second and Ninth Circuits on the standing issue. It is also clear that to merely say a plaintiff's injury must be "direct" rather than "indirect" serves only to announce a result; it is not a reliable tool by which the result may be reached. Respondents' mere enunciation of this result in their Brief in Opposition only serves to "beg the question" presented by this petition. The majority and dissenting opinions below and the wide diversity of opinion in the Circuits can only be described as decisions in search of a principle, a principle which can only be supplied by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

James V. Joy, Jr.
60 East 42nd Street
New York, New York
Attorney for Petitioner

Of Counsel:

Joy and Wolk
Edward V. Egert
Lucille J. Becker